Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1999

JAMES IDA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ Of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should This Court Clarify When a Reviewing Court May Sustain The Admission of Evidence On An Alternative Ground Which Was Not Argued or Ruled Upon in the District Court, Especially When the Alternative Ground Would Require A Cautionary Instruction Which Was Not Given and There Was No Grounds To Request It?

2. Should This Court Review A Denial of A Criminal Defendant's Fundamental Right To Present A Defense Where The Trial Court Excluded Evidence Necessary Offered To Rebut The Government's Claim Of Unexplained Wealth?

3. Should This Court Resolve a Direct Conflict Among The Circuit Courts of Appeals Regarding The Standard of Proof for Criminal Forfeiture Under The RICO Statute?

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In The

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Term, 1999

JAMES IDA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James Ida petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Court of Appeals' opinion is reported at 176 F.3d 580 (2nd Cir. 1999), reprinted herein at Appendix, pages 1a through 32a.

JURISDICTION

The Court of Appeals' opinion affirming the conviction was issued on April 30, 1999. Petitioner's Petition for Rehearing was denied on July 1, 1999. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5:

"No person shall be . . . deprived of life, liberty, or property without due process of law."

Title 18 United States Code §1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 y ears (or for life if the violation
> is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of state law --
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> (2) any --
>
> (A) interest in;
> (B) security of;
> (C) claim against; or
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.
>
> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Title 18 United States Code §1963(e) provides:

> Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers,

> conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

Title 21 United States Code §853(d) provides (for comparison):

> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
>
> (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

STATEMENT OF THE CASE

Petitioner Ida was initially charged, together with nineteen other defendants, with participating in a racketeering enterprise described as the "Genovese Family of La Cosa Nostra." Only three defendants went to trial, with the bulk of the government's evidence offered against the Petitioner Ida, who was alleged to be the "Consigliere" of "the Family."

In order to establish the existence and operation of the enterprise, the government offered the testimony of two notorious organized crime figures turned state's evidence, Carmine Sessa of the Colombo Family and Alphonse D'Arco of the Lucchese Family. These witnesses testified about the structure and internal rules of their respective organized crime families. A law enforcement "expert" in the area of organized crime also testified regarding the structure and operation of the "Mafia." All three witnesses testified about various rules, such as prohibitions against and penalties for dealing in narcotics, cooperating with law enforcement and consorting with another member's wife or girlfriend, as well as rules governing the commission of murder and the reporting and sharing the proceeds of illegal activities with other members of the family. There was no direct evidence how or whether these rules applied in the Genovese Family, since neither Sessa nor D'Arco, nor any witness for the government was a member or associate of that enterprise.

The government did not and could not prove that Petitioner Ida committed the alleged offenses personally, and thus argued that his criminal culpability arose from his supervisory position and some rule – such as the obligation of underlings to share proceeds of criminal activity or obtain approval for the commission of a crime. Vindication of rules against cooperating with the government, dealing in narcotics and prohibited consortium were all invoked to provide a motive for the three conspiracies to commit murder and the two murders alleged in the indictment.[1]

In an effort to fill the lacuna of proof regarding the operation of the enterprise charged in the indictment and the Petitioner Ida's alleged role in it, the government offered extrinsic evidence of crimes committed by members of other enterprises, including their out-of-court declarations to one another. Although the evidence was admitted at trial for its truth under the co-conspirator exception to the hearsay rule, the Court of Appeals found that the statements were "offered as evidence of commands or threat or rules directed to the witness, rather than for the truth of the matter asserted therein [and] are not hearsay." (Appendix A at 6a, App. C at 38a). Since the statements were offered and admitted, over objection, for their truth, the district court did not give a

---

[1] Ida was found to have committed one predicate act of murder. He was acquitted of the other predicate act and corresponding substantive count of murder.

limiting instruction. Indeed, defense counsel had no occasion to ask for one, in light of the court's ruling. The practice of sustaining the admission of evidence on an alternative ground under these circumstances – where the jury was not properly instructed – has a significant impact on the fair administration of justice in the federal courts. It therefore warrants review by this Court.

The denial of Petitioner's right to present a defense also warrants review by this court. Perhaps the most persuasive piece of evidence in the case against Petitioner was proof that he resided in a 1.5 million dollar home in an exclusive suburb of New York City. The government argued that his alleged ownership of this home was the ultimate proof that Petitioner was a "Mafia success story." When Petitioner attempted to offer evidence that the home was owned, not by him, but by individual with more than the means to afford such a home, his evidence was precluded. (Appendix D at 42a – 43a).

Petitioner was convicted of a racketeering ("RICO") conspiracy and substantive RICO in violation of 18 U.S.C, §§ 1962(d) and 1962(c), respectively, as well as various additional charges of conspiracy to murder, illegal gambling, conspiracy to control a union election by violence, extortion, interstate transportation of stolen property, mail fraud and tax fraud.

Petitioner was acquitted of a predicate act and substantive count alleging the murder of Ralph DeSimone.

Following the guilt phase of the trial, the jury heard evidence and rendered a forfeiture verdict finding that there were one million dollars in gross proceeds from the racketeering enterprise and that the home in Westchester County, a boat and a trailer were the proceeds of the Petitioner's racketeering activity. Over objection, the district court instructed the jury to apply a preponderance of the evidence standard in judging the forfeiture allegations. This issue is particularly worthy of review by this Court because there is a split in the Circuits regarding the applicable standard of proof for criminal forfeiture under the RICO statute.

The Petitioner was sentenced to life imprisonment. On April 30, 1999, a Panel of the Second Circuit Court of Appeals affirmed Petitioner's conviction on all counts, except that it reversed his 18 U.S.C. §1959 conviction for one count of conspiracy to murder and the corresponding predicate act of racketeering. A copy of the decision is appended hereto as Appendix A.

REASONS FOR GRANTING THE WRIT

I. This Court Should Clarify When a Reviewing Court May Sustain The Admission of Evidence On An Alternative Ground Which Was Not Argued or Ruled Upon in the District Court

On appeal, Ida argued that the trial court committed reversible error by admitting, over objection, scores of statements of declarants who were not members of the Genovese enterprise or the conspiracy alleged in the indictment. More specifically, Petitioner argued that statements made to Carmine Sessa and Alphonse D'Arco (the government's two key witnesses who were members of different enterprises) by members of their respective crime families in connection with the activities of those families unrelated to the charges in the instant indictment, should not have been admitted for their truth.

At trial and initially on appeal, the government argued that the challenged statements were admissible as co-conspirator statements under Fed.R.Evid. Rule 801(d)(2)(E), because they were made in furtherance of an "over-arching" La Cosa Nostra conspiracy, which included the Genovese family. (Govt. Br. at 105-106). The trial court had admitted the statements under an even broader rationale, ruling that out-of-court statements were admissible if they were in

furtherance of any conspiracy of which the witness was a member. (Appendix C at 38a).

Subsequent to the submission of the parties' briefs and oral argument, the Second Circuit decided *United States v. Gigante,* 166 F.3d 75 (2d Cir. 1999). Through the *Gigante* Court recognized that the 'conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d) (2) (E) must expand accordingly to encompass the full extent of the conspiracy," it also recognized that "even in the context of organized crime, there is a limit to the proper use of Rule 801 (d)(2)(E) to admit co-conspirator testimony." 166 F.3d at 82. Consequently, the Second Circuit in *Gigante,* held that the district court had committed error by admitting evidence under Rule 801(d)(2)(E) based on its finding that there was "a general overriding conspiracy among all of these alleged Mafia groups." *Id.* At 83.

Faced with the Second Circuit's holding in Gigante, 166 F.3d 75 (2d Cir. 1999), the government, for the first time in a supplemental appellate brief, argued that the statement(s) in question were not offered for their truth, but on the issues of credibility or state of mind. (Govt.Sup.Br. at 4).

The Second Circuit agreed, holding that "statements offered as evidence of commands or threats or rules directed

to the witness, rather than the truth of the matter asserted therein, are no hearsay." (Appendix A at 6a). The Panel also held that the other challenged statements bore on the witness' states of mind, not on the truth of any fact in any statement to which witnesses testified. (*Id.* at 7a). Thus, the Second Circuit held that the following testimony, *inter alia*, was not hearsay, since it was not offered for its truth:

1) Statements that the boss of the Colombo Family made to Carmine Sessa about Sessa's "duty to carry out orders, including murder, and his obligation of overriding loyalty to the Colombo Family." (Appendix A. at 6a).

2) Statements made by the boss of the Lucchese Family to Alphonse D'Arco that there could be "'no making of members' and 'no killing of people' without the boss's okay." (*Id.* at 6a – 7a).

3) Statements made to Sessa that an individual named Dominick Somma was being killed because he was dealing in drugs. *Id.*

Although the Court of Appeals concluded that the above statements were not offered for their truth, each statement helped to established a essential proposition that the government sought to prove at trial: 1) that members of the enterprise alleged in the indictment, the "Genovese Crime

Family," had a duty of loyalty which included carrying out orders, such as an order to commit murder; 2) that a murder could not be committed without the approval of the boss of the enterprise, and 3) that, according to the rules of the enterprise, dealing in narcotics was punishable by death. According to the indictment and the testimony at trial, Petitioner allegedly supervised a "crew" of members and associates who were obligated to follow his orders; he allegedly advised a co-conspirator that a murder had not been approved, and he subsequently conveyed the approval (conspiracy to murder Dominick Tucci, Count 11), and; he was allegedly responsible for seeing that a murder was carried out because the deceased had been dealing in narcotics (murder of Anthony DiLorenzo, Racketeering Act One).[2]

While the Courts of Appeals have held that they may affirm the holding of a district court "on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely," *see e.g. United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992); *United States v. Alvarez*, 137 F.3d 1249, 1251 (10th Cir. 1998), there must be a "record sufficient" to sustain a new rationale. In this case, no such record exists. Indeed, the government, both during the trial and on appeal, pressed for

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2 This single predicate act of murder was the oldest act and resulted in the Petitioner's mandatory life sentence under the RICO statute.

admission of the declarations at issue for the truth of the matter asserted. The evidence was admitted without instructing the jury that the evidence could not be considered for its truth. This allowed the government to argue by analogy and by implication that members of the Genovese Family operated in the same manner as members of the Colombo and Lucchese Family enterprises.

This case is unlike *United States v. Knox*, 124 F.3d 1360, 1363 (10th Cir. 1997), for example, where the admission of evidence was sustained on an alternative ground, but both relied upon by the district court and the ground relied upon for affirmance on appeal allowed the statements to be considered for their truth. Here, the statements were admitted for their truth, yet the Court of Appeals affirmed on the basis that, since the statements were not hearsay, they were not offered for the truth of the matter asserted therein. (Appendix A at 6a).

Had the declarations been offered other than for their truth, counsel would have asked for and received limiting instructions on the use of such declarations. *United States v. Cunningham*, 446 F.2d 194 (2d Cir. 1971) (Friendly, J.), *United States v. Ragghianti*, 560 2d 1376 (9th Cir. 1977) (Blumenfeld, J.) (reversible error to admit hearsay to impeach a witness without an instruction that statements could only be considered as bearing on credibility). Indeed in the very case

the Second Circuit relied upon, *United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985), the Second Circuit held that the defendant "would have been entitled to a limiting instruction preventing the jury from considering [the statements] for their truth had such an instruction been requested." *See also McCormick on Evidence*, 4th Ed. §§ 250 through 252.

In the case at bar, there was no limiting instruction either when the statements were offered or in the Court's instructions to the jury at the end of the case precisely because this genre of proof was offered and admitted substantively. When statements are admitted *for their truth* under an exception to the hearsay rule, counsel obviously has no grounds to request an instruction that the statements *may not be considered for the truth* of the matter asserted.

Consequently, the record in this case was not sufficient to support the admissibility of the statements at issue on the theory proffered by the government for the first time on appeal (and therefore waived), yet nevertheless adopted by a Panel of the Second Circuit. The hearsay statements in this case were offered as substantive evidence under the co-conspirator statement exception to the hearsay rule, in order to show how organized crime members act, think and speak, as well as to show that the witnesses – D'Arco and Sessa – were complying with their cooperation

agreements, which required them to make full, *truthful* disclosure of all of their criminal conduct.

The Second Circuit therefore erred in sustaining, on alternative, unraised grounds, the district court's admission of out-of-court statements when the jury was not given an appropriate instruction. This case presents an opportunity for the Supreme Court to address a practice that undermines the fair administration of justice.

II. Ida Was Denied His Fundamental Right To Present A Defense By The Trial Court's Exclusion of Evidence Necessary To Rebut The Government's Claim Of Unexplained Wealth

Lacking even a single witness claiming to be a member of the same organized crime family of which appellant was alleged to be a member, the government argued to the jury that it should infer Ida's guilt from, among other things, evidence of his unexplained wealth. To this end, it introduced evidence that Ida lived in a $1.5 million dollar home in Westchester County, New York, which he had supposedly purchased in the name of a nominee, James Hickey. (Cole, 1935, 1959, 1969; Laurent, 1967-9). Ida sought to rebut this suggested inference with proof that the home in fact had been purchased by Hickey, not Ida. As a first step in this argument, counsel intended to demonstrate

Hickey's financial wherewithal, by eliciting net worth information from Hickey's accountant. Hickey's means were such that he could afford, not only to purchase the home, but also to support several homes that he did not live in. The court, however, sustained objections to the proffered testimony. (Appendix at 42a - 43a). Ida was left without the foundation for his defense that he was simply the caretaker for the property of his friend. As a result, the jury was left with the misimpression that Ida had substantial wealth he could not explain, thus supporting the government's central charge that Ida was a high-placed member of organized crime. The court's refusal to permit the proffered evidence denied Ida his right to present a defense and, consequently, due process and fair trial.[3]

The government's claim that Ida's guilt might be inferred from his supposed ownership of Westchester home held in Mr. Hickey's name began at the very beginning of trial, when the government described Ida as "a Mafia success story," who grew up in Brooklyn and later "managed to live on an 11-acre estate in Westchester County complete with a stable of horses."
(Gov't Opening, 21). This theme of unexplained wealth continued throughout the trial and even into summations, where the government aggressively argued that the Westchester home really belonged to Ida and that Hickey was

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3. The Second Circuit did not specifically address this argument in its opinion.

merely "covering" for him -- and that this evidence of unexplained wealth powerfully demonstrated Ida's guilt of the racketeering charges:

> Just finally, on the racketeering, if you had any doubt that his enterprise was lucrative ... [y]ou have the house on Beaver Dam Road [in Westchester County]
> .... Obviously what's going on here is Mr. Hickey is covering up for Mr. Ida. He does it at 157 Beaver Dam Road, and he does it at IPPI ... They're covering up for Jimmy Ida ... He's the consigliere of the Genovese family, and he has wealth and he can't show it because he knows it's incriminating, so he puts it in other people's names.

(Gov't Summation, 4727-28).

Between its opening statement and closing argument the government was given a free hand to introduce evidence in support of its claim that the Westchester home, though in the name of Ida's friend, James Hickey, was in fact purchased with Ida's money, and that *Ida's de facto* purchase of the home could not be explained by virtue of Ida's reported income The government introduced Petitioner's tax returns, testimony from a real estate agent, a contractor who had made improvements to the property, a prior tenant on the premises, a veterinarian who cared for the horses, and other evidence showing Petitioner's residence on the property. (Campbell, 1890-1899; Vitiello, 2049-60; Cole, 1934, 1948; Corbett,

1986; Aromando, 1999-2012; Laurent, 1965-82); GX 2743). There was no question or dispute that Ida lived there. The only issue was whether he owned this expensive property.

Given the government's opening statement and its free-wheeling introduction of evidence in an attempt to show Ida's ownership of this million and a half dollar home, Ida's intention to proffer evidence to show that James Hickey had, in fact, purchased the home with his own -- not Ida's -- money was entirely appropriate and, indeed, essential to his defense. Ida attempted to lay the groundwork for this line of defense with evidence that Hickey in fact could afford to purchase the property. Accordingly, defense counsel sought to elicit from Jeffrey Lasky, Mr. Hickey's accountant, evidence of Hickey's substantial net worth, as well as conversations between Hickey and the witness prior to Hickey's purchase of the Westchester home. (Colloquy, 4450, 4455; A. 304, 309). To each such question, the government objected, and the objections were sustained. (*Id.*).

In support of the precluded line of inquiry, defense counsel explained that the testimony would demonstrate that Mr. Hickey did not "front" for Mr. Ida (TR. 4450; A. 304), was not "as the government has alleged ... a shell" (TR. 4452; A. 306), and that the proffered evidence was critical to rebut the government's "unexplained wealth argument." (TR. 4454; A. 308). The government countered that the evidence would raise more questions than it would answer and that "if the defense wants to prove that, they should bring Mr. Hickey in

here and have him say it was a gift." (TR. 4452; A. 306). The court agreed with the government, opining that the evidence would raise many other questions the jury would need to ponder. (TR. 4453; Appendix D at 42a – 43a). As a result, one of the defendant's principal theories of defense was precluded.

The primacy of the right to present a defense is undeniable:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense, *e.g., Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas,* 388 U.S. 14, 19 (1967); In re Oliver, 333 U.S. 257 (1948)

Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Put otherwise, "an essential component of procedural fairness is an opportunity to be heard," which would effectively be denied "if the State were permitted to exclude competent, reliable evidence ... when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987), *rev'd on other grounds*, 505 U.S. 317 (1992).

Ida was entitled to present evidence to debunk the powerful argument that he owned the Westchester home and therefore possessed wealth inconsistent with his reported income. His need to do so was heightened by the

government's repeated emphasis, during all stages of trial, on its "unexplained wealth" theory, proffered to fill the gap created by the general paucity of direct evidence of Ida's guilt. Neither the government nor the court took the position that the proffered evidence had no probative value. (Colloquy, 4452; A. 306). Rather, they suggested various reasons why its admission would be unfair to the government. The court, for example, said the evidence would necessarily raise additional questions, such as "whether there are homes that Mr. Ida has taken care of for him; whether any of the businesses in which he owns interests have labor contacts, or wish to avoid having labor contacts; whether there's anything Mr. Ida can do for him in that regard ...." (Colloquy, 4453; A. 307).

But to conclude that the defense evidence should be precluded because it would raise various collateral issues is to say that Ida was not entitled to rebut this significant part of the government's evidence. After all, it was the government -- not Ida -- that put the ownership of the house in issue. If the defendant's evidence had been admitted, the government would have been free to offer any rebuttal evidence it had to demonstrate that Hickey acted as a front for Ida. The court's circumscription of Ida's defense allowed the government to raise the spectre that Hickey acted as a front, without having to prove it and without allowing Ida to rebut the allegation.

In essence, the court let the jury hear but one side of the story -- the government's.

The government argued below that "if the defense wants to prove [Hickey's wealth], they should bring Mr. Hickey in here. . . ." (TR. 4452; A. 306). The government, however, has no right to tell the defense how to try its case. So long as the proffered testimony was competent and relevant, it should have been admitted. Certainly, a court enjoys discretionary authority, under Fed.R.Evid. 403, to exclude evidence the prejudicial effect of which substantially outweighs its probative value. But Rule 403 surely does not trump the constitutional right to present a defense, any more than did the hearsay rules wrongly invoked to preclude critical evidence in *Chambers v. Mississippi*, 410 U.S. at 300-303, *supra*. Here, the proffered evidence was the sole means sought to be utilized by Ida to support a material part of his defense, and its admission should not have been denied, upon some vague and misguided notion that its admission would raise collateral issues, or that another means of proving the same point -- more acceptable to the government -- was available.

Significantly, this was not a case in which the court sought to limit evidence that was merely cumulative of other evidence. *Cf. United States v. Mauro*, 80 F.3d 73 (2d Cir. 1996) (denial of continuance to subpoena witness was not

error, as proposed testimony was of marginal relevance and essentially cumulative). Rather, other than Lasky, the defense had introduced no other evidence to support its position that Hickey purchased the home with his own funds. Thus, the court entirely precluded a defense, which was undeniably relevant, and the evidence of which was competent and otherwise admissible. Worse, the issue addressed by the precluded evidence was in direct rebuttal to a theory of prosecution, the importance of which was repeatedly emphasized by the government, and which was the subject of testimony from numerous prosecution witnesses accompanied by dramatic photographs of the property. Permitting the government to freely pursue a damning theory of prosecution while completely shutting down the defendant's efforts to respond, is fundamentally unfair. The trial court's rulings denied Ida his right to present his defense and thereby denied him due process and a fair trial.

III. The Second Circuit's Adoption of A Preponderance Of The Evidence Standard for Criminal Forfeiture Under The RICO Statute is Erroneous and Conflicts With the Decision Of the Third Circuit, the Only Other Circuit to Have Analyzed The Issue

Over defense objection, the court below adopted the government's position that the appropriate standard of proof at the forfeiture stage of the trial was by a preponderance of the evidence. The Second Circuit agreed, relying on this Court's

decision in *Libretti v. United States*, 516 U.S. 29, 116 S.Ct. 356 (1995), which held that forfeiture is an aspect of punishment, not a separate substantive offense. The Second Circuit concluded that "[i]t follows as a matter of logic that, criminal forfeiture pursuant to 18 U.S.C §1963(e) depends on the preponderance of the evidence." (Appendix A at 25a).[4]

In *Libretti*, however, the issue arose under Fed.R.Crim.P. Rule 11 and concerned the factual basis for a guilty plea, which included a forfeiture provision. This Court never mentioned the standard of proof and simply confirmed what courts have long viewed as obvious, that forfeiture is an additional penalty. See, e.g., *United States v. Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980).

In *Libretti*, this Court recognized and specifically stated that the heightened procedural safeguards attendant to criminal forfeiture proceedings, including the right to a jury trial, are unique in the realm of sentencing. 116 S.Ct. at 364. Contrary to the Second Circuit's view, it follows as a matter of logic that a unique penalty provision requiring a jury determination at a criminal trial also requires proof by an elevated standard of proof.

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4 The specific RICO forfeiture provision is §1963(a), rather than §1963(e), which implements §1963(a).

In reaching its conclusion, the Second Circuit relied on narcotics cases in other Circuits holding that the preponderence standard applies to forfeiture proceedings under 21 U.S.C. § 853. (Appendix at 25a, citing *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997); *United States v. Rogers*, 102 F.3d 641, 647-48 (1st Cir. 1996)).[5] Unlike the RICO statute, however, §853 specifically provides a preponderance of the evidence standard for Continuing Criminal Enterprise ("CCE") forfeiture proceedings.

In *United States v. Pello*, 14 F.3d 881, 904-905 (3rd Cir. 1994), the Third Circuit reviewed the statutory history of the amendments to both the CCE and RICO forfeiture provisions and concluded that Congress intended the higher standard of proof to apply to RICO forfeitures under 18 U.S.C. § 1963 (a).

> In 1984, Congress enacted the Comprehensive Forfeiture Act of 1984 ... to amend the RICO and CCE forfeiture provisions. With respect to the burden of proof, Congress enacted two provisions, but did not provide any explicit guidance on § 1963(a) at issue in this case.

Id. at 902.

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5. The Second Circuit also cited *United States v. DeFries*, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997), a RICO case in which the D.C. Circuit held *in dicta* without analysis that the standard of proof is by a preponderance of the evidence, even though the government had requested the beyond a reasonable doubt charge given at trial.

The Act amended the RICO statute by adding a subsection providing that third parties have the burden of proving their interest in property subject to forfeiture by a preponderance of the evidence. 18 U.S.C. §1963(l). With respect to the CCE forfeiture provisions, the Act created a permissible presumption of forfeitability "if the United States establishes [its case] by a preponderance of the evidence." 21 U.S.C. §853(d). The Third Circuit therefore concluded:

> . . . Congress in one single act amended both the RICO and CCE by specifically providing a preponderance of the evidence burden of proof with respect to CCE criminal forfeiture proceedings and certain aspects of RICO, but left §1963(a) undisturbed. (citation omitted). This indicates that Congress intended the higher beyond a reasonable doubt standard to control in a §1963(a) proceeding. If Congress wanted a preponderance standard for §1963(a), it would have so stated as it specifically did for CCE.
>
> * * * *
>
> It is inconceivable that Congress intended a preponderance standard for §1963(a) claims, without specifically providing it, while it went through the trouble of specifying that third parties claiming interests in the property to be forfeited have the burden to prove their interest by a preponderance of the evidence.

Id. at 905.

The reasoning in *Pellulo* is irrefutable and there is nothing to the contrary in *Libretti* or the cases addressing forfeiture standards under the narcotics laws. Moreover, even after *Libretti* the Third Circuit adhered to its reasoning in *Pellulo*. In *United States v. Voigt*, 89 F.3d 1050, 1082-3 (3rd Cir. 1996), the Court addressed the standard of proof for forfeiture under 18 U.S.C. §982(a)(1) in a money laundering case. The Court of Appeals noted that the general, post-conviction forfeiture provision of §982 is more analogous to the narcotics (CCE) forfeiture provision (21 U.S.C. §853) than to the RICO forfeiture provision:

> There are good reasons for employing the reasonable doubt standard in the RICO context but not in the money laundering context. The RICO forfeiture provision is by far the most far reaching . . . . Indeed, §1963 sweeps far more broadly than the elements of the substantive RICO offense itself.

Id. at 1083-4.

The Third Circuit is the only Court to date to analyze the issue of the proper standard of proof for forfeiture under the RICO statute. The Second Circuit's decision provides no analysis and ignores the differences in the statutory language of the narcotics and RICO forfeiture statutes.

As in *Pellulo*, the forfeiture verdict in this case cannot stand, because a constitutionally deficient instruction on reasonable doubt cannot be considered harmless error. *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 2080-2083 (1993); *Pellulo*, 14 F.3d at 901, fn. 10, 906. Even utilizing a preponderance of the evidence standard in this case, the jury awarded the government only half ($1 million) of its claim of $2 million in proceeds of racketeering activity. Had the jury been properly instructed, there may well have been no forfeiture.

This Court should address this issue in order to resolve the conflicting interpretations of 18 U.S.C. §1963(a) among the circuit courts of appeals that have grappled with it.

CONCLUSION

For the reasons stated, this Court should grant the Petition for Certiorari to consider the important questions presented.

Dated: New York, New York
September 24, 1999

Respectfully submitted,

JOHN L. POLLOK
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No. _____

In The

Supreme Court of the United States

October Term, 1999

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JAMES IDA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ Of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

SW

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Appendix A – Opinion of the USCA for the Second Circuit, Decided April 30, 1999 [Pages 1a – 32a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: December 1, 1998 Decided: April 30, 1999)

Docket Nos. 97-1332, 97-1542, 97-1563, 97-1588, 97-1599

UNITED STATES OF AMERICA,

Appellee,

—v.—

LIBORIO BELLOMO, also known as Barney, JAMES IDA, also known as Jimmy, also known as Little Jimmy, also known as the Little Guy, and NICHOLAS FRUSTACI, also known as Nicky the Blond, and MICHAEL GENEROSO, also known as Mickey Dimino,

Defendants-Appellants,

THOMAS CESTARO, also known as Gigali, also known as Gigalese, THOMAS BARRETT, JOHN SCHENONE, also known as Big John, ANTHONY PISAPIA, also known as Tony Waterguns, also known as Fat Tony, LOUIS ZACCHIA, also known as Louis Zack, ANTHONY COIRO, MICHAEL AUTUORI, LEONARD CERAMI, LOUIS RUGGIERO, SR., COLOMBO SAGGESE, also known as Edward, JOSEPH PISACANO, JAMES PISACANO, ALBERT

Appendix A

[Opinion of the USCA for the Second Circuit]

SETFORD, also known as Spike, VINCENT BATISTA, also known a Skippy, and VINCENT ROMANO,

Defendants.

Before:

VAN GRAAFEILAND, CABRANES and NOONAN,*

Circuit Judges.

Appeal from a Judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*). Defendants Ida and Frustaci appeal their convictions upon jury verdicts of violations of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d), and of various additional charges. Ida appeals the forfeiture of his property. Defendant Generoso appeals the conditions of his sentence. The Court of Appeals, Noonan, Circuit Judge, sitting by designation, held that: (1) convictions for conspiracy to murder, mail fraud, fraud upon the Internal Revenue Service, illegal gambling, conspiracy to control a union election by violence, extortion, and transportation of stolen property were supported by the evidence; (2) convictions of racketeering in violation of 18 U.S.C. § 1962(c) and (d) were supported by the evidence; (3) evidence of overt act to carry out conspiracy to murder was insufficient where murder occurred at least four months after conspiratorial agreement and there was no proof of a connection between the murder, the putative murderer, and the

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* The Honorable John T. Noonan, Jr., United States Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

conspirators; (4) reversal of one charge of murder conspiracy did not establish retroactive misjoinder; (5) forfeiture of property verdict was affirmed because jury was properly instructed that standard of proof is the preponderance of the evidence standard; (6) defendant lacked standing to challenge the conditions of his sentence as they affect his family. AFFIRMED.

JOHN POLLOK and SUSAN WOLFE, HOFFMAN, POLLOK & PICKHOLZ, LLP, New York, NY (David M. Greenberg, of counsel), *for Appellant James Ida.*

ALAN S. FUTERFAS, New York, NY (Ellen B. Resnick, of counsel), *for Appellants Nicholas Frustaci and Michael Generoso.*

NELSON A. BOXER, Assistant United States Attorney for the Southern District of New York, (Mary Jo White, United States Attorney, Maria A. Barton, Barbara A. Ward, Dietrich L. Snell, Craig A. Stewart, Assistant United States Attorneys, of counsel), *for Appellee.*

JOHN T. NOONAN, JR., *Circuit Judge:*

James Ida and Nicholas Frustaci appeal their convictions, entered following a jury trial in the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*), of violations of RICO, 18 U.S.C. § 1962(c) and (d) and of various additional charges of conspiracy to

murder, illegal gambling, conspiracy to control a union election by violence, extortion, interstate transportation of stolen property, mail fraud, and fraud upon the Internal Revenue Service. Ida appeals the forfeiture of his property. Michael Generoso appeals the conditions of his sentence. We affirm the forfeiture of Ida'a property and we affirm his conviction in part; and we affirm Frustaci's conviction and Generoso's sentence.

PRELIMINARY OBSERVATIONS

The indictment charged "the Genovese Family of La Cosa Nostra" as an enterprise as defined by RICO, 18 U.S.C. § 1961(4) and added that the Genovese Family "was part of a nationwide criminal organization known by various names, including 'the Mafia' and 'La Cosa Nostra', which operated through entities known as 'Families'." These allegations in the indictment were proven at trial by the government's witnesses. These characterizations are not challenged on appeal.

A large part of the government's case depended on testimony on "the rules" governing the organization of the Families of La Cosa Nostra. The testimony was that the Families were organized in a hierarchy regularly consisting of the boss, the underboss and the consigliere. Lesser authority was assigned to capos who had a small number of persons reporting to them. The rules required that those working for the capos disclose their criminal activities and share their proceeds with the capos, who in turn would report and share with the higher officers. Members of a Family were initiated into the Family in a formal induction and were thereafter considered "made." Associates worked with made members under the Family's direction. Hangers-on helped the organization but were neither members nor associates. The hierarchy and control structure in La Cosa Nostra have similarly

been demonstrated in other cases. *E.g.*, *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999); *United States v. Locascio*, 6 F.3d 924, 936-37 (2d Cir. 1993); *United States v. Pungitore*, 910 F.2d 1084, 1098 (3d Cir. 1990).

The structure of the crime families was outlined by government experts and also by Alphonse D'Arco, who had been the acting boss of the Lucchese Family, and Carmine Sessa, who had been the acting boss of the Colombo Family. Parts of D'Arco's and Sessa's testimony bear on the structure and rules of the Families of La Cosa Nostra. It was within the province of the jury to decide if this testimony was probative as to the structure and rules of the Genovese Family.

The defendants point out that the rules in a number of respects were not observed. The rule against drug dealing was not observed, for example, by D'Arco. The rule against a member introducing himself or stating his rank in the organization was not always kept as the testimony of D'Arco also indicates. There was a further discrepancy between D'Arco's testimony that a member running a gambling operation did not have to share the proceeds with his capo and the testimony of a government expert that he did. The jury had to decide who to believe on that question. The jury had to decide how regularly the rules were kept. The jury had sufficient information to determine whether a rule could be treated as an indicator of actual conduct or whether a rule was infrequently or never observed.

The defendants appeal many of the evidentiary rulings of the district court on the ground that hearsay was improperly admitted. Under the rule set out by *Gigante*, 166 F.3d at 82, in order to comply with Fed. R. Evid. 801(d)(2)(E) and admit the testimony of a coconspirator, the district court "in each instance must find the existence of a specific criminal conspiracy beyond the general existence of the Mafia." It is

objected that evidence was admitted simply on the theory that the coconspirators' statements were in furtherance of the general conspiracy of La Cosa Nostra.

This court directed the appellants to provide briefing with specific instances of where the hearsay of coconspirators was improperly admitted on this basis. It is now apparent that a number of the instances objected to were not instances of hearsay, that is, statements made by an out-of-court declarant offered by a witness for the truth of the matter stated. *See* Fed. R. Evid. 801(c); *United States v. Detrich*, 865 F.2d 17, 20 (2d Cir. 1988); 6 *Wigmore on Evidence* § 1776 (Chadbourn rev. 1976 & 1998 Supp.). The most significant statements fall into the category of commands as to which the witness was the percipient hearer of the command. Statements offered as evidence of commands or threats or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay. *United States v. Stratton*, 779 F.2d 820, 830 (2d Cir. 1985).

In this fashion the defendants object to what was non-hearsay when they object that near the start of his testimony, Carmine Sessa was permitted to testify to what Carmine Persico, the boss of the Colombo Family, told him about his duty to carry out orders, including murder, and his obligation of overriding loyalty to the Colombo Family. Similarly Ida objects to D'Arco's account of his conversation with Victor Amuso when D'Arco was told that he was being made the acting boss. D'Arco testified that Amuso gave this order to him: "None of this and none of this without my okay," accompanying these two expressions with two gestures, one a pinch of his fingers and the other pointing a finger like a gun. There was no hearsay. D'Arco's testimony was to the communication of words he heard and gestures he saw. The meaning of the gestures, as understood by D'Arco, was "no

making of members" and "no killing of people" without the boss's okay.

In another instance where Ida alleges hearsay, Sessa was asked, "What was your understanding of why Dominick Somma was being killed?" to which Sessa answered, "I was told that he was dealing in drugs." The answer bore on Sessa's state of mind not on the truth of the motive for murder. Frustaci objects that D'Arco bolstered his credibility by testimony showing his inside knowledge of the crime families particularly by testifying to statements made to him. Such testimony similarly went to D'Arco's state of mind not to the truth of any fact in any declaration to which he testified. Again, Sessa testified that he had "criminal conversations while everybody was around the table." He was able to testify without hearsay as to what he himself had done, viz., engage in such conversation. He also testified that he usually met with his crew on weekdays and in restaurants. This testimony, now italicized in briefing as objectionable hearsay, is but a simple report of Sessa's own conduct.

Sessa also testified that he carried out an order to kill an informer by shooting at him six times as the informer backed into his own garage. Within two hours he reported the shooting to the acting boss of the Colombo Family at the latter's home; that report consisted in a single sentence: "Everything's okay with that thing." The report was made from a pay phone "so there would be no record." Ida objected only to Sessa's testifying to his single-sentence report. The testimony was properly admitted. Sessa was testifying to what he himself had said.

Again, D'Arco testified to a narcotics transaction in which he received a kilo from Davie Petillo, an associate of Lucky Luciano. D'Arco was testifying to his own crime. Another "hearsay" objection is made to D'Arco's testimony that he

saw Dilorenzo playing cards with a known federal informer and that "Carlo later on observed the same thing himself and came back and told me it's true." The testimony related specifically to the murder conspiracy with which Ida was charged, and which was proven by independent evidence to include Ida.

Finally, there is a general objection by both appellants to testimony about a number of murders and other acts of violence by the Colombo and Lucchese families with the effect of leading the jury to think that members of the Genovese family would behave in the same way of life. The objection is essentially an objection to relevance, not an objection to hearsay. As to relevance, it was—within broad limits not transgressed here—in the trial court's discretion to decide whether the structures of the other two crime families were similar enough to the Genovese family for the jury to be permitted to draw inferences from conduct of the other two families. Moreover, defense counsel in their opening statements had assaulted the credibility of D'Arco and Sessa as the testimony of murderers. The government was permitted to impeach its own witnesses to anticipate devastating cross-examination if such crimes were left unmentioned. It was not the government but counsel for a defendant who asked Sessa, "As you sit here now, do you consider yourself a vicious person for participating in the 13 murders you did?"

We have considered separately and cumulatively all the instances in which the appellants allege the improper admission of hearsay by conspirators. No hearsay that substantially affected the rights of the defendants was admitted. The statute is therefore conclusive: "On the hearsing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights

of the parties." 28 U.S.C. § 2111; accord, Fed. R. Crim. P. 52(a).

James Ida

Ida attacks the sufficiency of the government's evidence on each of the counts of conviction and on every one of the predicate acts of racketeering used to sustain Count 1, violation of 18 U.S.C. § 1962(d) (RICO conspiracy), and Count 2, violation of 18 U.S.C. § 1962(c) (substantive RICO). We review the challenges act by act.

The Conspiracy To Murder Anthony Dilorenzo

According to D'Arco, D'Arco and Anthony "Hickey" Dilorenzo had been incarcerated together in Raybrook Prison in 1985. Dilorenzo was a made member of the Genovese Family. He "acted strange" by talking about drug deals and by associating with a prisoner believed by D'Arco to be a government informer. D'Arco discussed the matter with another prisoner, Carlo Mastrototaro, a member of the Springfield, Massachusetts branch of the Genovese Family. Mastrototaro stated: "We will straighten it out in the street." Ida's hearsay objection to D'Arco testifying to Mastrototaro's statement was properly overruled on the ground that the statement was made by one coconspirator to another coconspirator in furtherance of the conspiracy to eliminate the informer.

In late 1988 Dilorenzo and D'Arco were both out of prison. Near the end of 1988 D'Arco encountered him on Prince Street in the company of Peter Chiodo, a capo in the Lucchese Family, and Raffie Cuomo, a member of the Lucchese Family. A week or so later in a restaurant in Manhattan D'Arco met him sitting with another soldier in the Lucchese Family and an associate of the Gambino Family. Dilorenzo started to talk business to D'Arco, who asked him

to step outside. Dilorenzo then asked D'Arco to introduce him to Carlo, a Lucchese associate who was a heroin dealer. D'Arco told him that "the last couple of guys" that talked about narcotics, "they whacked them." After this conversation D'Arco warned members of the Lucchese Family to stay away from Dilorenzo, believing that Dilorenzo was wearing a wire. D'Arco also talked to Ida who told him to tell the members of the Lucchese Family not to give Dilorenzo "confidence", i.e. do things together with him.

A little later D'Arco encountered Ida sitting with Dilorenzo at the Tazza di Café. Dilorenzo greeted D'Arco, stating that he knew him: "I go back with this kid, I used to hijack trucks." Ida was livid but sat "just with a little smile on" while Dilorenzo "kept it up for three or four minutes." Raffie Cuomo then entered the restaurant, greeted Dilorenzo as a friend, and left with him. Ida and D'Arco were alone together. Ida motioned to D'Arco to step outside and said to D'Arco, "Why they giving him so much, you know . . . keep them away from him, from Hickey." D'Arco said, "I'll see what I can do." He was about to say, "It's your own guy. Why don't you keep him away?" but Ida said, "You know what we are going to do?" D'Arco did not answer him. Ida said, "We are going to whack him."

On November 25, 1988, Dilorenzo was at his home in the town of West New York in New Jersey. In the early evening a jogger saw a man shooting into the front door of Dilorenzo's house. He also saw a car with New York license plates double parked in front of the house with a driver waiting. The jogger ran to call the police. The car was gone when the jogger returned from making his call. The police arrived at about 7:50 p.m. and came upon Dilorenzo shot to death in his backyard patio. The gun used to kill him was found on the other side of the backyard fence.

Appendix A

[Opinion of the USCA for the Second Circuit]

At 10:02 p.m. a collect call was made from a public telephone in West New York at a location three miles from Dilorenzo's home. The collect call was accepted at Ida's home on Staten Island. At 10:31 p.m. a second call was made from this public telephone to Ida's home. A third such call was made at 10:59 p.m. At midnight, at another public telephone booth less than a mile from the first, a fourth collect call was made to Ida's residence. Each of the four calls lasted one minute or less. No other collect call in the period November 16, 1988-December 16, 1988 was recorded from West New York to Ida's home.

The conclusion that Ida was a participant in a conspiracy to murder Dilorenzo is a conclusion based on the convergence of these pieces of evidence:

1. Dilorenzo as a made member of the Genovese Family had obligations to the Genovese Family; if the Genovese Family believed he was an informer it is likely the family would seek his death. It is equally unlikely that his death would have been arranged by some other branch of La Cosa Nostra.

2. Ida, only later consigliere but then a capo in the Genovese family, took specific responsibility to warn the Lucchese Family that Dilorenzo could not be trusted.

3. Ida told D'Arco, "We are going to whack him." "Whack" in Mafia argot now commonplace in gangster movies means "kill." The "we" of this sentence must be understood in the context of the conversation as referring to the Genovese Family. A reasonable jury could understand this statement as a declaration by Ida that he had associated himself with this project of the Genovese Family to kill Dilorenzo. A further reasonable inference is that if Ida, only a capo, was privy to the project, he was expected by the

administration of the Genovese Family to have a part in its execution.

4. The murder of Dilorenzo was itself an overt act of the conspirators. Its connection with the conspirators is proved by the four telephone calls. The jury did not know the identity of the caller or the identity of the answerer or the content of the calls. The jury could reasonably infer that the answerer at Ida's residence knew the caller or otherwise would not have accepted the first and the three subsequent collect calls. The jury could reasonably infer that the calls were connected to the murder—how else explain, except by improbable coincidence, four such calls from West New York on a single night when no other such calls were recorded at Ida's residence in the relevant period? The jury could reasonably infer that the caller knew that what he had to say about the murder would be of immediate interest to Ida.

Are there other possibilities such as to cause reasonable doubt? Suppose (1) that Dilorenzo had been murdered by someone because of a drug deal and the caller merely wanted to inform Ida of the event. Suppose (2) that the four calls had nothing to do with the murder and related only to some other criminal enterprise going on on the seamy side of this city of 38,000 persons. Suppose (3) that the Lucchese Family, convinced of Dilorenzo's untrustworthiness and tired of Genovese Family procrastination, had taken matters into their own hands and eliminated the suspected informer. None of these possibilities amounts to more than a hypothetical unsupported in the record. As to (1) the jury could reasonably conclude that such persistence in telephoning from public telephones would not have characterized a caller having no connection with the killing. As to (2), the jury could reasonably conclude that if Ida had other criminal business in West New York other traces of it would have appeared in his records. As to (3), the jury could reasonably conclude that

D'Arco was credible and that he was not carrying out a plot, blaming the Genovese Family for a murder he would have known was carried out by the Lucchese Family.

There is much that must remain a matter of speculation. The New York license plates on the car prove nothing. The jury could not be sure whether the calls came from the murderer, the driver, or some go-between. The jury could not be sure that Ida himself received any of the calls—the repetitions could have occurred because each time Ida was out. The jury could not have been sure whether the caller was calling to report the murder accomplished or to ask for assistance in the absence of the getaway car or to get directions as to what to do now. The capital point is that the caller, with a name known at Ida's home, had to know that the murder was the concern of Ida. The calls connect the killing to the conspirators and, in particular, to the conspirator who had taken responsibility for reining in Dilorenzo. It is undisputed that the conspiracy to murder Dilorenzo was in furtherance of the racketeering enterprise constituted by the Genovese Family.

The Conspiracy To Murder Dominic Tucci.

John Schenone was an associate of the Genovese Family and a member of Ida's crew. In December 1994 he was married to Carol Schenone and living sometimes with her and sometimes with a girlfriend, Eve Marie Ahearn. Dominic Tucci, also married, began an affair with Eve Marie Ahearn. When Schenone heard about it he called Tucci and threatened to kill him.

Schenone used Richard Sprague, a bartender, as an assistant in various criminal undertakings and as a driver. Sprague later became a witness for the government. In December 1994 Schenone told Sprague that he could not murder Tucci without getting Ida's permission. Schenone told Sprague that Ida refused permission.

Appendix A

[Opinion of the USCA for the Second Circuit]

Meanwhile, Tucci, upset by the threat, had moved from his own home to his mother's house. His mother's cousin was Michael Bove, a soldier in the Genovese Family. Tucci told Bove about the threat, and Bove told him not to worry about it.

Schenone continued to be upset by Tucci's affair. According to Sprague, as he drove Schenone back from Ida's residence in Katonah, Schenone told Sprague that he "got permission to whack Dominic, we got to figure out a way to do it. He said the only thing we can't do, we can't do it at his mother's house in the Bronx." Schenone sent Sprague to get his gun, but the gun was seized by the FBI and Tucci was not murdered.

The jury, believing the testimony that there was a chain of command in La Cosa Nostra and that the Boss's approval was necessary for every murder, could infer that Ida had secured the Boss's approval for Tucci's murder and so had entered into an agreement with Schenone to murder Tucci. That Ida later inquired of Schenone what he "was doing with the Dominic [Tucci] thing" could be interpreted as confirmatory of his participation. Regulating a conflict involving a Genovese Family associate and someone related to a Genovese Family soldier could be understood as Ida's purpose and qualify as a purpose to maintain his position in the racketeering enterprise.

A majority of the court believes that the foregoing constitutes sufficient evidence of Ida's conspiracy with Schenone to murder Tucci in furtherance of a racketeering enterprise. Judge Noonan is of the opinion that there was insufficient evidence to establish that Ida had the intent to kill Tucci and insufficient evidence of Ida's purpose to further the racketeering enterprise.

Appendix A

[Opinion of the USCA for the Second Circuit]

Mail Fraud On The City of New York

Ida was convicted of mail fraud on the City of New York, both in 1993 and 1994, in connection with mailings made to agents of the City to obtain permits for the Feast of Saint Gennaro. The Feast of Saint Gennaro is annually celebrated for 10 days on Mulberry Street in New York City. The Society of Saint Gennaro of Naples and the Suburbs (the Society), a tax-exempt organization, filed applications with the appropriate city agencies to close the street and arranged to pay license fees to the City. The license fees were 20% of the value of the contracts made between the Society and the individual vendors operating during the Feast. The Society's vendor contracts provided that a typical vendor pay $1,200 for a stand. Members of Ida's crew collected the amount due the Society from the vendors in cash, taking in an amount typically as much as $3,800 for each stand. The $2,600 difference was not paid to the Society. The crew reported to Ida, who supervised the scheme both as its leader and as the consigliere of the Genovese Family.

On the Society's federal tax return as a tax-exempt organization, Louis Zacchia from Ida's crew was listed as "treasurer/director when necessary"; he was also identified as vice-president of the Society. His offices are sufficient to make the Society chargeable with his knowledge that cash revenue from the vendors was being diverted from the Society.

Further evidence was supplied by the testimony of D'Arco. He was asked whether he had learned that "organized crime controlled the Feast of San Gennaro." He replied that he had and that what he had learned was this: "They controlled the curb space and they ran the Feast. They had an association that was housed in a store, a store front, with the saint in it on Mulberry Street." He added: "The curb space along the

whole length of Mulberry Street was rented. They rented it for stands and they collected money on that." D'Arco's testimony pointed directly to the Society of Saint Gennaro of Naples and the Suburbs as the association housed on Mulberry Street.

D'Arco then named individual members of the Genovese Family who had in turn "controlled" the Feast since the 1960s. He stated: "From 1988, when I became the captain, from that point forward, Jimmy Ida had control of that." When asked how he knew, he replied: "By talking with Jimmy and also with disputes that I had between Jimmy and Mickey Dimino [Michael Generoso] over our bread interests in the Feast."

A rational juror could infer from the financial importance of the vendors' cash payments to Ida's crew that Ida must have been aware of them and benefitted from them. A rational juror could infer that Ida must have known that the Society needed permits from the City to close the street and that the Society had to pay the City a fee based on the rents the Society collected. A rational juror could infer that Ida knew that the Society was not reporting the cash his crew took because these sums were not diminished by the City's 20% tax. The scheme to defraud was carried out by reports to the City omitting this cash. The intent to defraud, essential to proof of mail fraud and conspiracy to commit mail fraud, was Ida's intent to hide from the City the cash his crew and he got. The Society's mailings were a necessary feature of the scheme, so that the fraud, local in character, was accomplished by violation of federal law. *United States v. Bortnovsky*, 879 F.2d 30, 36-37 (2d Cir. 1989).

Ida was also convicted of conspiracy to defraud the United States by impeding the functions of the Internal Revenue Service in violation of 18 U.S.C. § 371. Such a conspiracy is

conventionally labelled "a Klein conspiracy," referring to *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In *Klein*, eighteen acts were enumerated as acts of concealment of income establishing conspiracy to defraud the United States by impairing the functions of the IRS. *Id.* at 915. Ida's acts of concealment meet the standard set by *Klein*. In particular, he was convicted of causing the Society to file false Tax Exempt Organization Returns. That he did the latter is established by his control of the collection from the vendors and his control of Zacchia, the Society's Treasurer.

Ida was doubly guilty because his own 1994 return did not reflect income from the Feast. Accepting the evidence that Ida's crew would have had to turn over to him part of the cash they took from vendors, a rational jury could conclude that omission of this amount from his return reflected a conspiracy between Ida and his crew to conceal this stream of cash from the IRS.

Control Of Illegal Gambling

Ida was convicted of conducting two illegal bookmaking operations, one at the converted Tazza di Caffe at 171 Mulberry Street from January 1991 to January 1995, and the other at an apartment on 229 East 53rd Street from August 1994 to January 1995. The evidence consisted of recordings of bets made at 171 Mulberry Street and evidence of betting slips at 229 East 53rd Street. Ida does not challenge that five or more persons were employed at each establishment, as required to establish a violation of 18 U.S.C. § 1955. Ida does argue on appeal that there is insufficient evidence to show his connection with either operation. However, 171 Mulberry Street was run by Thomas Cestaro, a member of Ida's crew. In light of the government's expert's testimony regarding the duty of crew members to share proceeds from criminal activ-

ity with their capo, the jury could rationally conclude that crew members regularly shared what they took in with their capo, here Ida.

The evidence that Cestaro also ran the East 53rd Street apartment is circumstantial: Frank Santoro, an employee at this location, was arrested in a police raid and charged in state court with illegal gambling; he expected Cestaro to pay for his lawyer. It was rationally inferable that Santoro had the expectation because he was working for Cestaro. The connection with Cestaro is a connection to Ida, Cestaro's capo.

As a corollary of his control of illegal gambling, Ida was convicted of conspiracy to defraud the United States by hiding his income from the operations from the IRS. Conspiracy with Cestaro to conceal this income is proved by Ida's failure to report it on his 1994 and 1995 federal income tax returns and by Cestaro acting as the front man for the two gambling enterprises.

Conspiracy To Control A Union Election By Violence

Local 46 of the Mason Tenders Union consists of general unskilled laborers employed at construction sites in Queens, including Kennedy Airport, a rich site for criminals bent on extortion. In 1989 the local was dominated by the Lucchese Family, which used it as a vehicle for extortion from construction contractors. At an earlier period it had been dominated by the Genovese Family. As a union election approached, the Lucchese Family candidate to be Local 46's president was Joe Luciano. The Genovese Family sought to regain control with their own candidate, Ed Diovisalvo. James Messera, a Genovese capo, informed the Lucchese Family that Luciano was a rat, i.e., a government informer. Ida, then a capo, repeated this accusation in negotiations with D'Arco for control of Local 46. At the end of the Ida-D'Arco

discussions, the accusation was withdrawn, and Luciano was elected president of Local 46.

The negotiations between the two crime families made no pretense of democratic methods; the negotiators assumed that control could be passed from one criminal organization to the other. Ida and Messera were rationally found guilty of conspiracy to commit extortion because they sought to replace control of the union by the Lucchese Family with control by the Genovese Family—a control that necessarily rested not on democratic election but on at least the threat of violence in violation of 18 U.S.C. § 1951. The right of the members of a union to democratic participation in a union election is property; that the right is intangible does not divest it of protection under the Hobbs Act. *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986).

Ida was also convicted of attempted extortion for the activities of Ed Diovisalvo during the period Ida was negotiating for control of Local 46. In this time Diovisalvo shook down several contractors dealing with Local 46. A rational jury could find that Diovisalvo reported to Messera who in turn reported to Ida.

Extortion of P. Chimento Trucking Company

Another dispute between the Genovese Family and the Lucchese Family involved P. Chimento Trucking. Evidence showed that in the 1980's up to late 1990 the company paid $8,000 to $10,000 a year to Pete DeFeo, a Genovese Family capo who did no work for the company. In 1989 the company contracted to do work for Emery Air Freight at Kennedy Airport. The Lucchese Family controlled unions in the air freight business and expected Chimento Trucking to sign contracts with these unions. Chimento Trucking refused. Ida, then a Genovese capo, intervened to explain to D'Arco that

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Chimento Trucking was "with us, ours," that is, that it was a tributary of the Genovese Family, with the implication that the Lucchese Family should not interfere with Chimento. As the dispute continued, Ida arranged for John Chimento to meet with Peter Chiodo, a capo in the Lucchese Family; Ida introduced Chiodo as his friend who would offer a new business opportunity for the company. Chiodo simply told Chimento that Chimento would have to use Chiodo's truck drivers at Kennedy. In January 1990 the Lucchese-dominated unions struck the warehouse at Kennedy used by Chimento Trucking. Ida worked to keep Chimento moving the freight. After four months of the strike, John Chimento paid the Lucchese Family $110,000, and the strike stopped. Ida was convicted of conspiracy to commit extortion on behalf of the Lucchese Family.

On appeal, Ida argues that there was no evidence that he sought to extort money from Chimento Trucking for the benefit of the Lucchese Family. Rather, Ida appears as the company's friend during the strike and its defender against the threats from the Lucchese Family. The government responds with the comment of the district court on Ida's motion for acquittal: "The jury reasonably could have inferred that Ida agreed to the payment in order to gain something from the Lucchese Family in the negotiations or in exchange for a Lucchese promise to allow the Genovese Family to continue its control over Chimento." The district court further observed that the jury could reasonably infer that the Genovese Family used force or the threat of force to assure the annual payments to DeFeo, the Genovese capo, who did nothing to earn them. In other words, the jury could have believed that Ida's negotiations with D'Arco were part of a Genovese Family conspiracy to keep in place an annual extortion from Chimento Trucking. The evidence sustains Ida's conviction.

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Transportation Of Stolen Property In Interstate Commerce

A further racketeering act with which Ida was charged was that from November 1, 1994 to April 1995 he and John Schenone and others transported in interstate commerce a stolen Caterpillar 950B Front End Loader worth over $5,000. In July 1995 Schenone was convicted of conspiracy to transport the Caterpillar loader in interstate commerce. Ida's conviction is supported by Schenone's obligation to share criminal proceeds with Ida as his crew leader. As the district court stated in response to Ida's motion for acquittal on the ground that he did not know of the projected interstate transport: "The fact that the goods in question were large, conspicuous machines, not readily concealed, supported the inference that the stolen goods would have had to have been transported out of New York to avoid detection." The jury reasonably concluded that Ida shared this inference. His conviction is supported by the evidence.

As Ida does not contest the government's proof of any other elements of the RICO statute, the government has proved racketeering in violation of 18 U.S.C. § 1962(c) and (d) when it has proved two predicate acts of racketeering. Counts One and Two were accordingly proved. The substantive charges of mail fraud, illegal gambling, extortion, interstate transportation of stolen property, and fraud on the Internal Revenue Service were also established. In the view of the majority of the court the substantive charge of conspiracy to murder Tucci in furtherance of the racketeering enterprise was also established.

Retroactive Misjoinder.

Ida asks that the court retroactively find misjoinder if it finds that any of the predicate acts of racketeering were insufficiently proved. We hold that one such act was insufficiently proved:

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Conspiracy to Murder Ralph Desimone

In 1991 D'Arco was acting boss of the Lucchese Family. Ida gave him a list of persons being proposed for membership in the Genovese Family. The acting underboss of the Lucchese Family, Anthony Baratta, said to D'Arco when he saw the name of Ralph Desimone, "He is a rat." A meeting was arranged in January or February 1991 with Ida, now the consigliere of the Genovese Family, and Michael Generoso, its acting underboss, and Liborio Bellomo, its acting boss. Baratta came, as did the acting consigliere of the Lucchese Family and D'Arco. Baratta told the group that Desimone had been a government witness. They asked if he was sure. Ida said, "Could you get us the minutes?" Baratta said, "Yes." At that point Generoso stepped forward and said, "We will take care of it." Along with his statement, Generoso made a motion with his finger like a gun. Ida said, "Yeah." All of them nodded.

On June 13, 1991 Desimone's body was found in the trunk of his own car at LaGuardia airport, his legs bound and his head covered with plastic garbage bags. He had been shot twice in the head and three times in the chest. At trial the government offered evidence that the murderer had been a friend of Desimone's, Louis Ruggiero, and Ruggiero went on trial in this case for the actual murder as an act of racketeering violative of RICO.

The jury could reasonably have concluded from D'Arco's account of the conversation in which Baratta disclosed his information about Desimone that the leaders of the Genovese Family including Ida had agreed to procure his death. Ida now contends on this appeal that there is insufficient evidence to prove that there was an overt act on behalf of the conspirators to carry out their agreement. The circumstances under which Desimone's body was found suggested murder

professionally executed. Money was in his wallet, suggesting that robbery was not the motive. The jury acquitted Ruggiero of the murder as an act of racketeering, a charge that required proof that the act was for money or intended to maintain or improve his position in the criminal enterprise. The absence of proof on the latter point did not mean that Ruggiero was innocent of the murder itself; as to that, the district court concluded, on the basis of the evidence presented, that Ruggiero was indeed the murderer. The Genovese Family had the motive to procure this murder.

Yet there is a gap in the government's case. The government contends in its brief that Ruggiero was "a long time Genovese associate." The evidence is that Ruggiero was known both to the murdered Family member Dilorenzo and to his own murder victim Desimone, a Family associate, and that Ruggiero was videotaped on three occasions in 1984 visiting the Palma Boys Social Club, a place where the affairs of the Genovese Family were discussed. The evidence falls short of establishing that Ruggiero was a Genovese Family associate. It falls short also of showing that Ruggiero was the instrument of the Genovese Family in carrying out its conspiracy to kill Desimone. There is no proof of a connection between the murder and the putative murderer and the Genovese Family.

A rational jury could believe that a murder decided upon by the administration of the Genovese Family would be carried out. A reasonable jury could also infer that, when the person chosen to be murdered was in fact murdered, the murder was the overt act by which the conspiracy was carried out. The difficulty lies in a rational trier of fact being certain beyond a reasonable doubt of this inference. Desimone, as aspirant to membership in the Genovese Family and therefore a man of marked criminal proclivities, was put to death at least four months after the conspiratorial conclave. On the

evidence presented there was no way that a reasonable jury could have been sure beyond a reasonable doubt that the murder was the overt act of the conspirators. Ida's conviction on this count, accordingly, cannot be sustained.

Nonetheless, we find no reason to order a new trial on the remaining counts of conviction. The charge of one conspiracy to commit murder was of a potentially inflammatory character, *see United States v. Wapnick*, 60 F.3d 948, 953-54 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996). But as the jury found Ida to be involved in two conspiracies to murder, it is speculative to suppose that three conspiracies to commit murder made him look worse than two. Moreover, the facts in each of the counts set aside are distinct and separable from the counts on which his conviction stands. No danger of overlap of the evidence existed. *See United States v. Rooney*, 37 F.3d 847, 856-87 (2d Cir. 1994). No retroactive misjoinder is established.

We have considered the other objections made by Ida to his convictions and find them without merit. He does not challenge his sentence of life imprisonment.

The Forfeiture of Ida's Property

Following Ida's conviction, a jury trial was conducted on the criminal forfeiture allegations in the indictment. The applicable forfeiture provision, 18 U.S.C. § 1963(e), does not specify the burden of proof to be applied by the jury. The court instructed the jury that the government must prove its case for forfeiture by a preponderance of the evidence. The jury returned a verdict of forfeiture. The district court entered an order of forfeiture of $1,000,000 worth of Ida's property.

On appeal, Ida asserts that the jury was erroneously instructed on the level of proof required, that the instruction

should have required proof beyond a reasonable doubt. The Supreme Court, however, has determined that criminal forfeiture is part of the process of criminal sentencing. *Libretti v. United States*, 516 U.S. 29, 39-41 (1995). Fact-finding at sentencing is made by a preponderance of the evidence. *United States v. Ruggiero*, 100 F.3d 284, 290-291 (2d Cir. 1996). It follows as a matter of logic that, absent any indication to the contrary in the statutory text, criminal forfeiture pursuant to 18 U.S.C. § 1963(e) depends on the preponderance of the evidence. *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997); *United States v. DeFries*, 129 F.3d 1293, 1312-13 (D.C. Cir. 1997); *United States v. Rogers*, 102 F.3d 641, 647-48 (1st Cir. 1996). No error occurred in the instruction.

Nicholas Frustaci

Frustaci was convicted of two predicate acts of racketeering—conspiracy to commit extortion and operation of an illegal gambling business—together supporting violations of 18 U.S.C. § 1962(c) and of § 1962(d). He was also convicted of conspiracy to commit extortion in violation of 18 U.S.C. § 1951 and of conspiracy to defraud the Internal Revenue Service in violation of 18 U.S.C. § 371. He presses various objections against each of these convictions, which we review in turn. It is not challenged on this appeal that Frustaci was a member of the Genovese Family.

Conspiracy To Commit Extortion

In 1987 New York Tech Windows ("N.Y. Tech"), a window installation company, received referrals from, and shared some profits with, Summit Restoration ("Summit"). In 1988 N.Y. Tech terminated the arrangement. Later, Todd Mazlum and Anthony Barbarise, the company principals, were summoned to a meeting with Peter ("Petey") Chiodo, the

Lucchese Family capo, who told them that "whatever Summit owned was his" and that N.Y. Tech's business was Summit's. Barbarise was smacked in the face to set the tone of this meeting. Mazlum and Barbarise were in fear.

N.Y. Tech through Todd Mazlum's cousin, Bobby ("Romano") Boyajian, got in touch with Frustaci, who undertook negotiations with Chiodo. Frustaci and Romano told Mazlum and Barbarise that Chiodo would allow N.Y. Tech to escape by a "buyout" or payment of $100,000. Mazlum asked Frustaci and Romano to negotiate a lower price, and eventually the payment was reduced to $25,000, which the company paid in cash to Romano. Frustaci later had a conversation with a witness cooperating with the government and was recorded recounting the incident and stating: "Petey said, 'Nicky, I'll give them to you because I love you like my brother.' . . . . N.Y. Tech is me now."

On these facts a rational jury could conclude that Frustaci had joined Chiodo in agreeing to extort N.Y. Tech and that, using the menace already conveyed by Chiodo, Frustaci conspired to force the cash payment of $25,000. That he could speak of the company as himself, using the same idiom Chiodo had earlier employed and that Ida used to explain his control of Chimento Trucking, highlights his view of the company as prey.

Frustaci objects to the closing argument of the prosecutor that touched on payments the company subsequently made on a car used by Frustaci without reference to the company's business. The prosecutor declared: "They're paying against their will." The prosecutor's inference was not an unreasonable one even if it undercut the statement of the government's own witness from the company. In any event it was harmless because the jury acquitted Frustaci on the substantive count of extortion of N.Y. Tech Windows; the jury,

it must be inferred, looked only at the agreement Frustaci had with Chiodo.

The conspiracy was charged as an act of racketeering and as a separate crime. On appeal, Frustaci contends that the jury was improperly charged: "The defendant's racketeering activity either must be related to the enterprise's activities or the defendant must have been enabled to commit the racketeering activity solely by virtue of his position in the enterprise." Frustaci did not object to the instruction. Review here is for plain error. The objection focuses on a single sentence, ignoring the fact that the court went on to charge the jury: "This . . . element requires also that a defendant have had some role in the operation, direction, or management of the enterprise." This charge accurately complied with *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). Reading the instructions as a whole, the sentence just quoted does not conflict with the first quotation but complements it. There was no error. That Frustaci had a role in the operation of the Genovese Family so that he could bargain with Chiodo was established by the evidence.

Frustaci's contention that the district court improperly questioned Mazlum borders on the frivolous. Intelligent questioning by the trial judge is the judge's prerogative; he need not be a silent spectator; Judge Kaplan's questions brought clarity to the examination of the witness.

Frustaci's conviction of conspiracy to extort as an act of racketeering was supported by the evidence.

Illegal Gambling

In March 1991 New York police executed a search warrant on a second-floor apartment at 517 Second Avenue in Manhattan. They found over 300 betting slips reflecting over $7,000 in bets for the day; four electronic gambling devices

containing $870; and a satellite system enabling simultaneous reception from three racetracks. Frustaci was in the office. D'Arco testified that Frustaci had told him that he was the co-owner.

In the trial of the present case five New York state judgments of conviction of gambling charges of persons arrested in the March 1991 raid, including Frustaci, were admitted in evidence. Frustaci's counsel objected to the introduction of these judgments on the ground of relevance. The objection was properly overruled as the judgments went to two elements in the racketeering case: the enterprise involved five or more persons and was in violation of state law.

In closing argument Frustaci's counsel suggested that Frustaci could have had reasons for pleading guilty to the state gambling charge without being guilty in fact. The government objected to this argument as lacking a basis in the record, and the court sustained the objection. Frustaci's counsel then objected to admission of the state judgments, arguing that they were hearsay. This objection was forfeited. It was not made contemporaneously with the introduction of the evidence. *See United States v. Martinez*, 775 F.2d 31, 36 (2d Cir. 1985).

To have his objection considered here, Frustaci must rely on the criteria permitting consideration of plain error. *Olano*, 507 U.S. at 732. The introduction of the judgments was a conveniently expeditious way of proving what the government could have proved by more cumbersome routes, that at least five persons were involved in the operation of the gambling enterprise. The integrity of the trial was not violated by a shortcut unobjected to at the time it was taken. Because Frustaci fails to meet the plain error standard, we need not reach the issue of whether admission of the state judgments of conviction was error. *Id.*

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Frustaci argues that he was prevented from putting forward as a defense the argument that sometimes people plead guilty for reasons other than actual guilt, for example to avoid an expensive trial or the risk of being convicted of a more serious charge. Frustaci offered no evidence that such was the case as to the gambling pleas. When he attempted to assert this theory in argument to the jury, the district court properly sustained the government's objection that the argument was without foundation.

Frustaci's conviction of illegal gambling as a second act of racketeering was supported by the evidence. As he was convicted of two predicate acts of racketeering, and has failed to raise challenges to the government's proof of the other RICO elements, he was properly convicted of violating 18 U.S.C. § 1962(c) and (d).

Tax Fraud

Like Ida, Frustaci was convicted of conspiracy to defraud the United States by impairing the functions of the Internal Revenue Service by concealing his income from his gambling enterprise, in violation of 18 U.S.C. § 371. His employees were shown to have shredded records of this unlawful business. He himself represented to the Veterans' Administration in applications made to it in 1991, 1992, 1993, and 1994 that he had no income. He himself did not file a federal income tax return.

Frustaci's offense went beyond his failure to file a return or to disclose his income. He took active steps to prevent discovery by the destruction of the gambling records and his misrepresentations to the VA. Frustaci argues that the only proof of gambling income was up to March 1991; he was indicted on June 10, 1996, so the five year statute of limitation, 18 U.S.C. § 3283, barred his indictment. The objection was not raised before this appeal and is forfeited. *United*

States v. Hansel, 70 F.3d 6, 7 (2d Cir. 1995). The objection is also without merit because the relevant statute of limitations is 26 U.S.C. § 6531(1) and (8). *United States v. Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). The overt acts of destroying records and the 1991 misrepresentation to the VA occurred within the six years allowed.

Frustaci does not challenge his sentence of five years' imprisonment to be followed by three years of supervised release.

Michael Generoso

Michael Generoso, the acting underboss of the Genovese Family who made the decision testified to by D'Arco to kill Desimone, pleaded guilty to conspiracy with Liborio Bellomo, the acting boss of the Genovese Family, to commit extortion from May to September 1989 of the members of Local 46 of the Mason Tenders Union in violation of 18 U.S.C. § 371. In the plea agreement he agreed not to contest the civil forfeiture of two bank accounts totaling $246,000, representing the proceeds of extortion in violation of 18 U.S.C. § 1951 and 29 U.S.C. § 186. Generoso had been indicted with Ida for the conspiracy to murder Desimone but did not plead to that offense and, after the plea bargain was entered, was not tried for it. The plea agreement stipulated that the base offense level was 18, pursuant to U.S.S.G. § 2B3.2(a); and that Generoso deserved a 2 point increase as a leader in the offense, *id.* § 3B1.1(c), a 3 point decrease for not completing all acts believed necessary for the offense, *id.* § 2X1.1(b)(2), and a 3 point decrease for acceptance of responsibility, *id.* § 3E1.1(b)(2). The resulting offense level was 14. Generoso had zero points for criminal history. The sentencing range was one year and three months to one year

and nine months. Generoso reserved the right to appeal his sentence.

On October 14, 1997, the district court sentenced Generoso. The court imposed a 4 point upward adjustment for Generoso's role in the conspiracy, *id.* § 3B1.1(a), and another 7 point upward adjustment because the conspiracy reflected organized crime, *id.* § 2B3.2(b), Note 8. The court awarded 3 points under § 2X1.1(b)(2) and awarded only 2 points for Generoso's acceptance of responsibility but departed downward in view of Generoso's age (80 years) and heart problem. *Id.* § 5H.1 and § 5H1.4. With these adjustments, the court imposed a sentence of imprisonment of one year and nine months to be followed by three years of supervised release.

The plea bargain was, of course, not binding on the court, which in fact imposed a sentence no greater than the plea bargain had indicated. The government had argued that the court should take into account Generoso's participation in the conspiracy to murder Desimone. The court said it would do so "at some point in the future if it proves appropriate to do so." At the sentencing of Generoso the court did not find it appropriate.

In specifying the conditions of supervised release, the court provided that the first 2½ years should be "served on home detention, subject to electronic monitoring and the acceptance by the defendant and his family and all persons residing with him of electronic monitoring by the government of all telephones and other means of communication that are available in the home; and the defendant will be permitted to leave the home only with advance notice to Probation for the purpose of obtaining medical attention or attending religious services or otherwise with the advance written permission of the Probation Department."

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Generoso appeals the condition of electronic monitoring of telephone calls as it affects his wife and daughter. He argues that there is no indication in the record that he would commit crimes through the use of his wife and daughter and that the condition violated 18 U.S.C. § 3583(d) by involving a greater deprivation of his liberty than is reasonably necessary to protect the public.

Generoso does not have standing to raise the rights of his own family. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). To the extent that his appeal asserts a restriction on his own freedom, the district court was in a position to determine what measures were necessary to keep him, once a high-ranking leader in the Genovese Family, from being in touch with the Family without the government's knowledge. No abuse of discretion has been shown. *See United States v. Germosen*, 139 F.3d 120, 131 (2d Cir. 1998).

The judgment against Ida is AFFIRMED in part and is REVERSED with respect to the conspiracy to murder Desimone; the judgments against Frustaci and Generoso are AFFIRMED.

Appendix B – Decision of the SCCA Denying Petition for Rehearing, Dated July 1, 1999 [Pages 33a – 34a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the first day of July one thousand nine hundred and ninety-nine.

USA,

v.

Dkt No: 97-1332

Bellomo,

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant James Ida.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix B
[Decision of the Second Circuit Court of Appeals]

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk
By:_____
Beth J. Meador,
Administrative Attorney

Appendix C – Oral Decision of the USDC Regarding Hearsay Objection, Transcript of March 5, 1997 [Pages 35a – 39a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

S1 96 Cr. 430 (LAK)

v.

JAMES IDA, a/k/a "JIMMY," "LITTLE JIMMY," "THE LITTLE GUY," NICHOLAS FRUSTACI, a/k/a "NICKY THE BLOND," and LOUIS RUGGIERO, SR.,

Defendants.
----------x

March 5, 1997
9:15 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
NELSON A. BOXER
MARIA A. BARTON
BARBARA A. WARD
Assistant United States Attorneys

JEFFREY C. HOFFMAN
Attorney for Defendant, IDA

Appendix C
[Oral Decision of the USDC]

ALAN G. POLAK
Attorney for Defendant, FRUSTACI

HOWARD JACOBS
Attorney for Defendant, RUGGIERO

Appendix C
[Oral Decision of the USDC]

Sessa - direct

(At the sidebar)

MS. BARTON: Your Honor, I believe that this is going to come up repeatedly. The witness was part of the La Cosa Nostra. It's an overriding conspiracy.

As part of that conspiracy, he was inducted in that family, he committed certain crimes in that family, and his conversations with people like Carmine Persico or Greg Scarpa are coconspirator statements, and it goes to establish the background of how he committed certain crimes, of the fact that he was associated with the Colombo family, and the fact that he rose within the Colombo family and ultimately how he had relationships with other crime families. And I believe they're all admissible.

MR. HOFFMAN: The objection is, your Honor, anything anyone did in every crime family cannot be deemed, and I've never heard it deemed in any case, as being in furtherance of the specific conspiracy charged in that case. Otherwise, one would say that in every organized crime case, anything and everyone who did anything during the years of that conspiracy who was a member of organized crime in any family anywhere would be in furtherance of it. And That's just not the case and I object to it.

THE COURT: The statement, in order to come in under 801(d)(2)(E) doesn't have to be in furtherance of the charged conspiracy. It can be in furtherance of any conspiracy, right?

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[Oral Decision of the USDC]

MR. BOXER: That's correct.

MR. POLAK: This is a conspiracy he had with Persico, they have not charged any of these people.

THE COURT: That's exactly my point.

MR. BOXER: In fact in some of the cases where we have produced 3500 material, other district judges have let this exact material in in light of the overriding conduct of organized crime families and how they conduct business.

THE COURT: I do not think I have to go that far in order to receive it. I think the point is that in order to come in, it need merely be in furtherance of a conspiracy, to which the witness and declarant or parties -- indeed, I am not sure about the witness -- the declarant, and it does not have to be the charged conspiracy and in that case, I think I was mistaken in ruling as I did.

MR. HOFFMAN: That would be like saying any activities he had with Greg Scarpa, trying to lose a law enforcement tail or anyone that helped him out in illegal activities is part of statements made in furtherance of that conspiracy.

THE COURT: I am not rising to the bait.

(In open court)

Appendix C
[Oral Decision of the USDC]

THE COURT: I withdraw the ruling. The objection is overruled. The reporter, please, will read the last question to the witness, if you can find it quickly. If you cannot, I can, thanks to this miraculous device.

The question, Mr. Sessa, was: And what did Carmine Persico say to you in this conversation?

THE WITNESS: He told me that I was asked to do something to kill my friend Nicky Cowboy and I didn't do it. Do I have anything to say for myself. I says no. He said, do you know that the loyalty that you had to your friend, he wasn't loyal to you. I did know it but I told him I didn't know.

The next thing he said was, Do you have anything to say for yourself. I said the only thing I have to say, Carmine, is that I'm honored to be here amongst you men, and he looked at everybody in the room and gave a smile and said it's an honor to have you, but from now on your loyalty is not to anybody else but this family and whatever Greg tells you to do, that's what you do.

BY MS. BARTON:

Q. Mr. Sessa, what did you understand that to mean, that your loyalty was only to that family?

A. Whatever I was -- whatever was asked of me, that I should do it

Appendix D – Oral Decision of the USDC Regarding Exclusion of Defense Evidence, Transcript of April 8, 1997 [Pages 40a – 43a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

S1 96 Cr. 430 (LAK)

v.

JAMES IDA, a/k/a "JIMMY," "LITTLE JIMMY," "THE LITTLE GUY," NICHOLAS FRUSTACI, a/k/a "NICKY THE BLOND," and LOUIS RUGGIERO, SR.,

Defendants.
----------x

April 8, 1997
9:15 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
NELSON A. BOXER
MARIA A. BARTON
BARBARA A. WARD
Assistant United States Attorneys

JEFFREY C. HOFFMAN
Attorney for Defendant, IDA

Appendix D
[Oral Decision of the USDC]

ALAN G. POLAK
Attorney for Defendant, FRUSTACI

HOWARD JACOBS
Attorney for Defendant, RUGGIERO

Appendix D
[Oral Decision of the USDC]

Lasky - direct

(At the side bar)

MR. HOFFMAN: I intend to offer, I think it's from 1989 to present, the tax returns of Mr. Hickey that have been prepared by their accountant. The government has just told me they object to all of that. The purpose for it is to show that Mr. Hickey for many many years has been a multimillionaire and he is involved in all kinds of businesses. And our argument that in view of that he didn't need any money from Jimmy Ida, he doesn't front for Jimmy Ida and his activities, his earnings, and the various things he owns, we believe the jury has the right to infer that it wouldn't be anything that he would be involved with.

MS. WARD: Your Honor, I don't think that that proves that. We object strongly. I don't think it's proper to argue the fact that Mr. Hickey is wealthy, and the resulting inference that he's just somehow throwing money around to James Ida. This is an explanation for his wealth. In fact, that raises more questions than it creates. And, if the defense wants to prove that, they should bring Mr. Hickey in here and have him say it was a gift.

THE COURT: The objection is sustained. It has very little probative value. I won't say none, but very little. The prejudicial effect is quite obviously that it opens up the whole question of what Hickey does, what use Mr. Ida may be to him in his various other enterprises, and we could probably be here for the rest of the year.

Appendix D
[Oral Decision of the USDC]

MR. HOFFMAN: This is simply to show that Mr. Hickey is not as the government has alleged, and the jury might view it as a shell.

THE COURT: I understand what the argument is. But it also holds up such questions as whether there are homes that Mr. Ida has taken care of for him; whether any of the businesses in which he owns interests have labor contracts, or wish to avoid having labor contracts; whether there's anything Mr. Ida can do for him in that regard.

I could go on at tremendous length. It involves the question of whether they use carting service, whether they do construction, whether they buy fish. I mean we can go on and on.

MR. HOFFMAN: It is the Court's position that I can't show any of the walth or assets of Mr. Hickey through this witness?

THE COURT: Listen, I have basically ruled on the questions that are before me. Draw whatever conclusions you wan and make whatever record you want.

MR. HOFFMAN: Thank you.

Appendix E – Oral Decision of the USDC Regarding Forfeiture Standard of Proof Instruction, Transcript of April 16, 1997 [Pages 44a – 48a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

S1 96 Cr. 430 (LAK)

v.

JAMES IDA, a/k/a "JIMMY," "LITTLE JIMMY," "THE LITTLE GUY," NICHOLAS FRUSTACI, a/k/a "NICKY THE BLOND," and LOUIS RUGGIERO, SR.,

Defendants.
----------x

April 16, 1997
11:05 a.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
NELSON A. BOXER
MARIA A. BARTON
BARBARA A. WARD
Assistant United States Attorneys

JEFFREY C. HOFFMAN
Attorney for Defendant, IDA

Appendix E
[Oral Decision of the USDC]

ALAN G. POLAK
Attorney for Defendant, FRUSTACI

HOWARD JACOBS
Attorney for Defendant, RUGGIERO

Appendix E
[Oral Decision of the USDC]

field if it hadn't been changed already by Austin and Alexander.

THE COURT: Ms. Wolfe, any response to that learned disposition?

MS. WOLFE: Only a point which Mr. Polak points out and that is that when you're speaking about civil litigants who may have suffered harm, there's always the remedy of restitution. And I say that only to try to prevent the Court from going off on a tangent which I don't think is necessary because restitution is really the sentencing remedy applicable for harm to victims other than the United States.

□

I think it would be a very interesting circumstance, and I don't think there's any precedent, if there were an acquittal on the forfeiture side of the case and then the government came in and brought a civil action. I think there would be serious double jeopardy implications. I don't think that double jeopardy cases in the forfeiture area are that strong that they would answer that question.

THE COURT: Okay.

I am really persuaded by the government's argument on this point. It seems to me that Libretty makes it crystal clear that criminal forfeiture is an element of sentencing, not an element of criminal liability. With the sole exception of the death penalty statute, all other factual determinations in

Appendix E
[Oral Decision of the USDC]

sentencing matters are made according to the preponderance of the evidence standard. I do not regard the death penalty analogy as either relevant, or, if it were relevant, helpful to the defense.

I find it not particularly relevant because as somebody a lot smarter than I once said, without needing all of the additional brain power to say it, death is different. And I simply do not find the analogy between the safeguards that are appropriate before a death penalty is imposed particularly pertinent in deciding the question of what standard of proof ought to govern the forfeiture of property which is alleged to be the product or the proceeds of criminal proceeds. Even if I thought it were relevant, I would not think it helpful to the defense, as I said a minute ago, because I think in fact it cuts in the other direction.

Congress went to considerable lengths in the death penalty statute to make crystal clear that the government has the burden of proof beyond a reasonable doubt as to the aggravating factors relevant to the determination whether to impose a sentence of death. The fact that Congress did so there and did not similarly take pains in this statute to require proof of the government's forfeiture allegations beyond a reasonable doubt, were it relevant, would suggest that Congress did not so intend in this case.

□

A fair amount more can be said. We have explored the possibility of civil forfeiture proceedings by the government, the standard of proof that would be relevant there, as well as the standard of proof that applies in the civil RICO actions.

Appendix E
[Oral Decision of the USDC]

While I think it is not necessary to reach any of that, I do think that if I did reach it, it would further support this conclusion. We are here, after all, talking about property, money. And the very same property here could be reached and applied to a civil judgment based on proof exactly the same as we have heard in this case plus proof of causation and damages on the basis of a preponderance standard. It would make, in my view, little sense to require the government to prove the forfeiture allegations beyond a reasonable doubt while letting anybody who can pay the $160 to file a civil complaint to reach the same property on the basis of the same allegations and much the same proof on the basis of the preponderance.

So, if indeed it is necessary to charge on this point, which I guess we will all see, I will charge on the basis of the preponderance.

Okay. Anything else we need to do before -- Mr. Jacobs?

MR. JACOBS: Your Honor, I don't know if it's helpful, I did make a phone call to the lawyer who does